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RIGHT TO A NEW TRIAL AFTER THE EXPIRATION OF THE TERM. — Where a man has been convicted of a crime, and later-discovered evidence tends to show that his conviction was improper, either on the merits, or because the jury was prejudiced, one would naturally suppose that he would be granted a new trial. A recent decision of the United States Supreme Court, however, declares that unless the request for a new trial was made before the expiration of the term at which the judgment of conviction was entered, this relief is impossible. *United States v. Mayer*, 235 U. S. 55.<sup>1</sup> In that case, after the end of the term, it was discovered that one of the jurymen who served at the trial had been prejudiced against the defendant. It was nevertheless held that a new trial could not be granted, since with the expiration of the term the court had lost all control over the judgment.

Unquestionably, the general rule at common law was that a judgment could not be altered by the court which granted it after the expiration of the term at which it was granted.<sup>2</sup> To this rule the law recognized but three exceptions. Clerical errors could be corrected at any time.<sup>3</sup> By a writ of *audita querela*, relief might be had against the consequences of a judgment on account of some matter of defense, which had arisen since its rendition, and which could not have been taken advantage of otherwise.<sup>4</sup> Writs of error *coram nobis* were allowed to bring to the attention of the court errors of fact in the procedure not appearing on the face of the record, unknown to the court, and which if known in season would have prevented the judgment.<sup>5</sup> These writs were generally limited to situations where, unknown to the court, one of the parties to the judgment had died before it was rendered, or was an infant, a *feme covert*, or insane.<sup>6</sup> Thus, where the grounds for the relief asked were newly discovered evidence or partiality of the tribunal, the law afforded no remedy.<sup>7</sup> In such cases, however, equity in its jurisdiction to enjoin judgments obtained through fraud, accident, or mistake would compel a new trial at law to prevent an inequitable use of a legal right.<sup>8</sup> Modern statutes have to some extent remedied this defect in the law by providing that within a prescribed time, generally one, two, or three years after

<sup>1</sup> For a statement of the case, see p. 434 of this issue of the REVIEW.

<sup>2</sup> *Bank of United States v. Moss*, 6 How. (U. S.) 31; *Ex parte Sibbald*, 12 Pet. (U. S.) 488; *Phillips v. Negley*, 117 U. S. 665. BLACK, JUDGMENTS, § 306; FREEMAN, JUDGMENTS, § 96. The somewhat elusive reason given for this rule was that "during the term, the record remaineth in the breast of the judges; but when the term is past, then the record is in the roll and admitteth no alteration, averment, nor proof to the contrary." CO. LITT., 260 (a).

<sup>3</sup> *Philips v. Smith*, 1 Stra. 136. This is not a true exception, since the judgment is not altered. The record alone is altered, to make it conform to the judgment in fact rendered.

<sup>4</sup> 3 BL. COM., 405, 406; see *Avery v. United States*, 12 Wall. (U. S.) 304.

<sup>5</sup> *United States v. Plumer*, 3 Cliff. 28; *Adler v. State*, 35 Ark. 517; *State v. White*, 75 Mo. App. 257; see *Asbell v. State*, 62 Kan. 209.

<sup>6</sup> See *Brunsen v. Shulten*, 104 U. S. 410, 416; *Adler v. State*, *supra*; *Howard v. State*, 58 Ark. 229. The more summary method of procedure by motion has now generally taken the place of these old forms. See *Harris v. Hardeman*, 14 How. (U. S.) 334; 3 BL. COM., 406; FREEMAN, JUDGMENTS, § 94.

<sup>7</sup> Since the error was not in the record, no aid could be obtained from a higher court by appeal or otherwise.

<sup>8</sup> *Tovey v. Young*, Prec. Ch. 193; *Platt v. Threadgill*, 80 Fed. 192; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; 4 POMEROY, EQ. JUR., 3 ed., § 1364.

the entry of the judgment, the court may on motion grant a new trial on various grounds, generally including prejudice of the jury and newly discovered evidence.<sup>9</sup> But since these statutes do not as a rule cover criminal cases,<sup>10</sup> and since equity has always refused to interfere in criminal cases where no property rights are involved,<sup>11</sup> the defendant in the case under discussion is without redress. His only hope lies in a pardon. This is obviously an inadequate and cumbersome remedy.<sup>12</sup> The executive has not the proper procedure for hearing and determining the merits of the question. From the point of view of the defendant, it is unjust, since he has the burden of proving his innocence to the executive, whereas, until justly convicted, he should be entitled to a presumption of innocence. And, further, he is denied an opportunity to prove that he has been unjustly accused. From the point of view of the state, the defendant should not be set at liberty until an impartial jury has acquitted him on the merits of the case. Thus the granting of a new trial can alone secure the rights of all parties.

Moreover, in this respect a sharp distinction should be noted between civil and criminal cases. In the former, it is clearly to the interest of the community that there be a definite time after which a judgment cannot be altered. Otherwise title to property would be insecure, and business would be unreasonably hampered. In criminal cases, on the other hand, no property rights can be prejudiced by altering the judgment at any time. The state is simply exacting punishment, and the life and liberty of the accused are at stake. It indeed seems a very mockery of justice to deny relief to one thus unjustly convicted on the mere technicality that the term has expired.<sup>13</sup> This gap in the law has been supplied in England by a statute creating a separate court for criminal appeals and giving to it a wide discretion in granting new trials at any time and on any grounds.<sup>14</sup> It is submitted that such legislation reaches an eminently satisfactory result, and should be followed in the United States.

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THE FIVE PER CENT CASE AGAIN.—Seemingly, rate problems, like the heads of the Hydra, are no sooner disposed of than they return twofold to plague their assailant. Upon a rehearing of the Five Per Cent Rate Case the Interstate Commerce Commission have modified their original decision. *The Five Per Cent Case*, 32 I. C. C. 325.<sup>1</sup> The Com-

<sup>9</sup> See 4 POMEROY, EQ. JUR., 3 ed., § 1365; *Fuller v. United States*, 182 U. S. 562; KY. CODES, § 344; BURNS' ANNOTATED IND. STATUTES, §§ 585, 587, 589.

<sup>10</sup> See *Klink v. People*, 16 Colo. 467; *Howard v. State*, *supra*.

<sup>11</sup> *Kerr v. Corporation of Preston*, 6 Ch. D. 463; *Portis v. Fall*, 34 Ark. 375; see 1 POMEROY, EQ. JUR., 3 ed., § 197. In a few exceptional cases, equity has interfered in criminal proceedings to protect property rights. *Iron Works v. French*, 12 Abb. N. C. 446.

<sup>12</sup> See *Sanders v. State*, 85 Ind. 318.

<sup>13</sup> Where the grounds for relief were known at the time judgment was entered, a limitation on the time within which to bring the motion may be perfectly just.

<sup>14</sup> 7 Edw. VII., c. 23.

<sup>1</sup> Cf. *The Five Per Cent Case*, 31 I. C. C. 551. For a *résumé* of this first decision, see 28 HARV. L. REV. 97. On September 19, 1914, the Commission ordered, "That